

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
)	
Flexibility for Delivery of Communi-)	IB Docket No. 01-185
cations by Mobile Satellite Service)	
Providers in the 2 GHz Band, the)	
L-Band, and the 1.6/2.4 GHz Band)	
)	ET Docket No. 95-18
Amendment of Section 2.106 of the)	
Commission's Rules to Allocate)	
Spectrum at 2 GHz For Use by the)	
Mobile Satellite Service)	

**COMMENTS OF TELEPHONE
AND DATA SYSTEMS, INC.**

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Table of Contents

INTRODUCTION AND SUMMARY	2
I. THE PROPOSED TERRESTRIAL MOBILE ALLOCATION WILL UNDERMINE THE AUCTION PROCESS	3
II. THE "FLEXIBILITY" PROPOSAL WOULD BE UNFAIR TO WIRELESS LICENSEES.....	8
III. ALLOWING MSS LICENSEES TO PROVIDE TERRESTRIAL MOBILE SERVICE WOULD BE AN ILL-ADVISED ATTEMPT TO SALVAGE A MISTAKEN ALLOCATION	10
CONCLUSION.....	14

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Telephone and Data Systems, Inc. on behalf of itself and its subsidiary, United States Cellular Corporation ("USCC") (collectively "TDS"), hereby files its comments on the Notice of Proposed Rulemaking in the above-captioned proceeding.¹

USCC owns and/or operates cellular mobile telephone and PCS systems serving 3.3 million customers in 44 MSA, 103 RSA and 16 BTA markets. TDS thus has a considerable interest in any action the FCC may take to allocate spectrum for mobile uses.

¹ In the Matter of Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and 1.6/2.4 GHz Band; Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2GHz for Use by the Mobile Satellite Service, IB Docket 01-185, ET Docket 95-18, Notice of Proposed Rulemaking, FCC 01-225 (adopted August 9, 2001) ("NPRM")

Introduction and Summary

TDS is opposed to the NPRM's proposal to allow Mobile Satellite Service ("MSS") licensees to provide terrestrial wireless service for the following reasons.

First, granting such "flexibility" to MSS licensees, whether in the 2 GHz or "L Bands," will undermine the integrity and logic of the auction process. Since 1993, the FCC has consistently found that allocating mobile wireless frequencies by auction promotes the "highest and best" use of such frequencies. However, to allow other licensees, such as MSS licensees, which have not undergone an auction process, to provide wireless mobile services would diminish the incentives of carriers to participate in wireless auction and undermine auctions as the preferred selection method.

Second, granting terrestrial authority to MSS licensees would be fundamentally unfair to cellular, PCS and SMR licensees which can obtain new wireless spectrum only through an auction process.

Finally, granting such flexibility would reinforce an ill-advised frequency allocation to MSS licensees, many of which are in dire financial straits, at a time when wireless spectrum is needed by those who can and will actually use it to provide enhanced wireless services.

Moreover, the international character of MSS licensing was crucial to the FCC's decision not to allocate MSS licenses by auction. That rationale would not be applicable to an FCC decision to allow MSS licensees to become domestic wireless service providers.

I. The Proposed Terrestrial Mobile
Allocation Will Undermine The
Auction Process

In 1993, Congress made a fundamental change in how initial FCC licenses were to be allocated. Newly enacted Section 309(j) of the Communications Act gave the FCC authority to employ competitive bidding procedures to choose among mutually exclusive applications for initial licenses.

Under Section 309(j)(2)(B), the FCC had to determine, for a given radio service, whether use of a system of competitive bidding for initial licensing would promote the objectives described in Section 309(j)(3) of the Act, which are:

- “(A) the development and rapid deployment of new techniques, products and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
- (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;
- (C) recovery for the public of a portion of the value of the public spectrum made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and
- (D) efficient and intensive use of the electromagnetic spectrum.”

In 1994, the FCC determined that wireless services should be licensed by competitive bidding,² finding that such a system would:

- “1) promote competition among a diverse group of service providers; 2) award licenses to the parties who will provide services and use spectrum most efficiently; and 3) award licenses expeditiously.

The FCC further found that auctions:

“[b]y awarding licenses to those who value them most highly, while maintaining safeguards against anti-competitive concentration, will likely encourage growth and competition for wireless services and result in the rapid deployment of new technologies and services...In general, competitive bidding is a licensing scheme that should place licenses in the hands of the parties able to use them most effectively.”

Ibid., at 2349-2350.

In 1997, Congress reaffirmed its faith in auctions as the FCC’s preferred method of selecting licensees when it enacted the Balanced Budget Act of 1997. That Act amended Section 309(j)(1) of the Communications Act to require the FCC to select among mutually exclusive applications for initial licenses or permits using auction procedures, with certain exceptions, specified in Section 309(j)(2), which are not relevant to wireless allocations.³

² In the Matter of Implementation of Section 309(f) of the Communications Act – Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348, 2349 (1994) (“Second Report and Order”).

³ See Pub. L. No. 105-33, Title III, III Stat. 251 (1997); In the Matter of Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd. 22709, 22715 (2000).

The FCC's wireless licensing system has achieved the objectives of its creators. In June of this year,⁴ the FCC summarized the flourishing state of the wireless industry in the following terms:

“In the twelve months ending December 2000, the mobile telephony sector generated over \$52.5 billion in revenues, increased subscribership from 86 million to 109.5 million, and produced a nationwide penetration rate of roughly 39 percent...Broadband PCS carriers and digital SMR providers continue to deploy their networks. To date, 259 million people, or almost 91 percent of the total U.S. population, have access to three or more different operators (cellular, broadband, PCS and/or digital SMR providers) offering mobile telephone service in the counties in which they live. Over 214 million people, or 75 percent of the U.S. population, live in areas with five or more mobile telephone operators competing to offer service. And 133 million people, or 47 percent of the population, can choose from at least six different mobile telephone operators.”

Sixth Competition Report, p. 5.

This increase in competition, combined with the emergence of national carriers and “one rate” plans, has also exerted steady downward pressure on wireless rates, thus benefiting consumers.⁵

Thus, in short, the wireless licensing system is a huge success story, which has also has resulted in billions of dollars being paid into the federal treasury in auction payments.

⁴ In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services. FCC 01-192, released July 17, 2001 (Sixth Competition Report), 2001 LEXIS 3823.

⁵ See In the Matter of Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Services Notice of Proposed Rulemaking, WT Docket No. 00-193, FCC 00-361, released November 1, 2000, ¶ 23.

However, as the FCC knows, wireless auctions have not always been successful. Successful auctions have come about only when auction winners have been able to purchase an exclusive right to provide specific services on specific frequencies under economic circumstances which offered an opportunity for a reasonable profit.

In other words, for competitive bidding to fulfill its promise, the FCC must meet the reasonable expectations of those who participate in its auctions or else the system will break down.

Among the reasonable expectations of wireless auction winners is that the FCC will not act, subsequent to the auction, to devalue the spectrum they have purchased.

Devaluation can occur in different ways. Bankruptcy courts were persuaded by the argument put forward by certain 1996 C-Block PCS auction winners that the FCC had caused the value of their newly won spectrum to decline, by precipitously allocating additional wireless spectrum shortly after the 1996 C-Block auction had closed, resulting in a “fraudulent conveyance” of spectrum to the C-Block winners.⁶

Moreover, while it is clear that wireless licensees cannot have a reasonable expectation that the FCC will not allocate additional spectrum for wireless purposes, they are entitled to assume that the FCC will not allocate additional spectrum for wireless purposes without an auction process, which places new competitors on the same level playing field as existing licensees.

⁶ See, e.g. Next Wave Personal Communications v. FCC, Case No. 00-142 (D.C. Cir., decided June 27, 2001).

To put it simply, if the FCC, in the name of “flexibility,” is going to bestow on licensees in the ITFS, MMDS, MSS and presumably other services incidental terrestrial mobile authority, it will be introducing significant new uncertainties about the value of any future spectrum rights, which could inhibit or prevent potential bidders from participation in future wireless auctions.⁷ The implicit understanding between auction participants and the FCC about what winning bidders are buying, which existed before the diluting effects of “flexibility” were introduced, will no longer exist. And, even if the auctioned wireless spectrum’s loss of value cannot easily be measured, such ancillary wireless allocations, often made without meaningful consideration of interference or other crucial issues, can only create uncertainty about the regulatory “playing field” which is the enemy of orderly and successful auctions .

In sum, if all spectrum allocations are to be made “flexible,” why bid billions of dollars for one particular part of the spectrum, as opposed to simply buying up existing licenses in other services and then waiting for a “flexibility” order?

Moreover, apart from the policy wisdom or lack thereof of universal “flexibility,” that approach is flatly opposed to the basic rationale of Section 309(j), which is that it is not spectrum “flexibility” but rather competitive bidding for valuable frequencies which will produce the highest and best use of spectrum.

⁷ See In the Matter of Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Services, including Third Generation Wireless Systems; Amendment of the U.S. Table of Frequency Allocations to Designate the 2500-2520/2670/2690 MHz Frequency Bands for Mobile-Satellite Service, First Report and Order and Memorandum Opinion and Order, FCC –01-256, released September 24, 2001 (“ITFS/MMDS Order”).

II. The “Flexibility” Proposal Would Be Unfair To Wireless Licensees

It is axiomatic that the FCC is required to accord comparable treatment to similarly situated parties.⁸ Yet an awareness of the implications of this simple, yet very important, principle is absent in the NPRM.

If the FCC ultimately grants the requests of New ICO Global Communications (Holdings) Ltd. (“ICO”) and Motient Services, Inc. (“Motient”) and allows 2 GHz and L-Band MSS licensees “to integrate terrestrial components with their networks using assigned MSS frequencies”⁹ it will be making a grant of nationwide terrestrial mobile authority to entities which secured their licenses merely by applying for them. The contrast with PCS licensees, for example, could not be sharper. Such licensees are limited to Major Trading Area (“MTA”) or Basic Trading Area (“BTA”) licenses, and must either be willing to purchase such licenses at auction or pay those who have already done so. Any cellular or SMR license for which there are mutually exclusive applicants must also now be allocated by competitive bidding.

The FCC should not do this, in part because of the special considerations which produced the MSS licensing rules. The international character of satellite authorizations was crucial to the FCC’s decision not to pursue auctions as a selection method for MSS.

⁸ Melody Music, Inc. v. FCC, 345 F2d. 730 (D.C. Cir. 1965).

⁹ NPRM, ¶ 5.

In the 1999 Notice of Proposed Rulemaking concerning 2 GHz MSS licensing,¹⁰ the FCC recounted its reasons for reversing its 1995 tentative conclusion that auctions should be used as a selection method.

The FCC noted that MSS auctions could “open the door” to other countries requiring US MSS licensees to pay for spectrum in these countries, thereby delaying service by triggering multiple auctions. The Commission found that “international concerns” would thus justify “assiduous efforts to avoid mutual exclusivity, which would trigger auction requirements.” Ibid, at 14 FCC Rcd., 4849-4850.

And, while the Commission found that “coordinated multinational auctions” might conceivably solve the problem, such auctions would require excessive time and would “raise national sovereignty and access issues.” The FCC thus concluded in the NPRM that it would serve the public interest to “undertake considerable efforts to develop solutions which would avoid mutual exclusivity among satellite systems.” Ibid.

Such efforts were undertaken, and in 2000, an MSS licensing solution which did not involve mutual exclusivity was duly found.¹¹

Obviously, none of these special considerations shaping the MSS licensing decision is present with respect to domestic terrestrial licensing decisions. Thus, it would be both unfair and contrary to the auction mandate contained in the statute to allow MSS licensees to use their unique licensing position to acquire an

¹⁰ In the Matter of The Establishing of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band, Notice of Proposed Rulemaking, 14 FCC Rcd. 4843 (1999).

¹¹ In the Matter of Policies and Service Rules For the Mobile Satellite Service in the 2 GHz Band, Report and Order, is 15 FCC Rcd. 16127 (2000).

additional terrestrial authorizations which would ordinarily be subject to the auction requirement.

At no point in the NPRM does the FCC even acknowledge that there is a fairness issue involved in permitting MSS licensees which have received their licenses under the special procedures applicable to international satellite licensing to become domestic competitors of wireless carriers.

Just as the FCC is obliged to maintain the integrity of its auction processes, it also cannot treat competitors or potential competitors in such a radically dissimilar manner without violating fundamental principles of administrative law.

III. Allowing MSS Licensees To Provide Terrestrial Mobile Service Would Be An Ill-Advised Attempt To Salvage A Mistaken Allocation

The FCC will make its decision in this proceeding under extraordinary circumstances. Throughout the past two years, the FCC has wrestled with the urgent issue of new spectrum allocations for “third generation” wireless service.

It is undisputed that the need for such additional spectrum is real and growing. Yet, the potential spectrum available to the FCC to meet the need continues to shrink. Last month, the FCC declared the 2500-2690 MHz band off limits for 3G.¹²

More recently, the National Telecommunications and Information Administration (“NTIA”) and the Department of Defense (“DoD”) announced an agreement under which 1770-1850 MHz, which had been previously proposed for

¹² See ITFS/MMDS Order, supra.

3G use, would remain allocated to DoD,¹³ with the 1710-1770 MHz and 2110-2170 MHz bands to be allocated to 3G. That 120 MHz of spectrum is less than the minimum of 160-180 MHz most carriers consider necessary for 3G purposes.

In light of those developments, the FCC must now look elsewhere for additional spectrum for 3G purposes. One possible source of such spectrum is the 2 GHz MSS allocation at 1990-2025 MHz and 2165-2200 MHz. And indeed, the FCC has placed consideration of this spectrum for 3G purposes on the agenda in its companion NPRM dealing with additional possible 3G spectrum.¹⁴

In TDS's view, the FCC should, at a minimum, strictly enforce the MSS's "construction milestones" set forth in Section 25.143(e)(3) of the FCC's Rules and "repossess" unused MSS spectrum for 3G purposes if MSS licensees fail to fulfill those obligations.

In considering these issues, the FCC must take into account the disastrous financial condition of many 2 GHz MSS applicants and L-Band licensees.¹⁵ Indeed,

¹³ See "Wireless Loses Most of 1.7 GHz Band to DoD," RCR Wireless News, October 8, 2001, p.2.

¹⁴ See In the Matter of Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, ET Docket No. 00-258. FCC 01-224 Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, released August 20, 2001. In comments to be filed in this proceeding, TDS will endorse the immediate reallocation of 14 MHz of 2 GHz MSS spectrum to meet advanced wireless needs. The reallocation of spectrum of individual MSS licensees which fail to meet their construction deadlines which TDS endorses in those comments is in addition to that initial proposed reallocation.

¹⁵ For example, ICO and its fellow 2 GHz MSS applicant Iridium LLC have declared bankruptcy. Also, 2 GHz applicants Globalstar, L.P., Constellation Communications Holdings, Inc. and Mobile Communications Holdings, Inc., all face grave financial difficulty. See August 16, 2001 Application For Review filed by Verizon Wireless. et al, In the Matter of Applications/LOIs of ICO Services Limited et al, File No. 188-SAT-LOI-97 et al., p. 10, n. 30.

the essential premise of both the Motient and ICO requests is that 2 GHz MSS is not a viable service under present rules.

TDS suggests that it would make more sense from the standpoint of the public interest to require MSS licensees which cannot meet their obligations to return their spectrum, and then reallocate it through auctions to carriers which have already shown their ability to construct and operate wireless systems.

Perhaps anticipating such arguments, the NPRM notes (§§ 24 and 25) that both Motient and ICO maintain that only by offering terrestrial service in urban areas will MSS be able to serve “rural and underserved areas.”

Two difficulties with this argument are: (1) no evidence has been produced that satellite telephone service will ever be a cost-effective alternative for rural consumers; and (2) no attention is given to the rural service already being provided by wireless carriers such as Western Wireless and USCC and to such carriers’ plans to expand such service.

All available evidence indicates that rural areas will be better served by allocating more spectrum to 3G than by continuing a decade-long failed effort to establish MSS. In its Comments in the 700 MHz proceeding (GN Docket 01-74), filed May 15, 2001, USCC demonstrated that it and other cellular, PCS and other CMRS providers are already providing essential wireless services in rural areas.¹⁶

USCC demonstrated in those comments that there are significant cost efficiencies from using additional wireless spectrum (in that case, 700 MHz

¹⁶ USCC cited ALLTEL, Western Wireless, Qwest, Century Tel, Centennial Rural Cellular, Leap Wireless and NTELOS as examples of CMRS carriers now providing significant service in rural carriers which could, and will make good use of additional frequency allocations.

spectrum) at existing wireless base station sites and that the best way to improve service in rural areas would be for the FCC to adopt market area definitions to allow existing rural providers a fair chance at winning auctions for such rural markets.

However, availability of spectrum must precede market area definition. It is not sound policy to reserve 70 MHz of 2 GHz spectrum for MSS applicants whose record of actual service provision is mixed at best and many of which are in dire financial straits.

If the FCC grants mobile authority to MSS applicants, it can look forward to many requests for extensions of time and/or waivers by such applicants regarding their construction milestones. Such filings will, in fact, represent, in part, attempts to preserve their rights to construct national wireless networks, or to sell those rights. This would constitute an attempt by such licensees unjustly to enrich themselves at the expense of the public.

TDS believes the best way to provide improved service to rural areas is to allocate the maximum spectrum possible for advanced wireless services, including any 2 GHz spectrum left unused by MSS applicants unable or unwilling to comply with their original MSS construction requirements.

The FCC should heed the judgment of Congress and its own past statements that auctions produce the “highest and best” use of radio spectrum.

The 2 GHz MSS allocation has been shown by experience to have been a mistake. Further, that allocation has been overtaken by events, which have

produced an imperative need for additional spectrum below 3 GHz for advanced wireless services.

The FCC should not, out of a laudable but misplaced desire to improve wireless service in rural areas, perpetuate that mistake.

Conclusion

For the foregoing reasons, the FCC should not change its rules to permit MSS licenses to offer terrestrial mobile services.

Respectfully submitted,

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